UNITED ORIENTAL ASSURANCE SDN BHD

v.

PENANG MEDICAL CENTRE SDN BHD

COURT OF APPEAL, KUALA LUMPUR
LAMIN MOHD YUNUS PCA
ABU MANSOR ALI JCA
MOKHTAR SIDIN JCA
[CIVIL APPLICATION NO: P-08-328-1996]
13 MARCH 1999

CIVIL PROCEDURE: *Appeal - Leave to appeal - Principles governing granting of - Courts of Judicature Act 1964, s. 68(1)(a)*

This was an application by the 2nd defendant ('the applicant'), pursuant to s. 68(1)(a) of the Courts of Judicature Act 1964, for leave to appeal to the Court of Appeal against a decision of the High Court given in favour of the plaintiff hospital ('the respondent'). The applicant, the respondent and Kenchan Associates Sdn Bhd ('the 1st defendant') had entered into an oral agreement wherein the respondent had agreed to participate in a group medical insurance scheme ('the insurance plan'). Due to some long outstanding claims which were not settled by the applicant to the respondent, the respondent terminated the insurance plan and sought to recover the outstanding sum of RM120,288.40 from the applicant. The sole issue before the High Court was whether the applicant was liable as insurers *per se* to the respondent. The learned judge gave judgment in favour of the respondent.

Held:
Per Abu Mansor Ali JCA

[1] An appellate court will not lightly interfere with the findings of the court below unless it can be shown that the lower court has erred. In this case there was no *prima facie* error made by the learned judge.

[2] The applicant is at liberty to appeal to the Federal Court. However, before doing so, the applicant must consider its position in view of the decision of the Federal Court in *Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors* [1995] 3 CLJ 485, where the Federal Court, for reasons given, declined to give leave to appeal to it from the refusal of leave to appeal by the Court of Appeal.

[Application for leave to appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Permohonan ini telah dibuat oleh defendan kedua ('pemohon'), berdasarkan kepada s. 68(1)(a) Akta Mahkamah Kehakiman 1964, bagi mendapatkan kebenaran untuk membuat rayuan kepada Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi yang terdahulu, yang mana telah memihak kepada plaintif ('responden'). Pemohon, responden dan Kenchan Associates Sdn Bhd ('defendan pertama') telah sama-sama bersetuju melalui satu perjanjian secara lisan, di mana responden telah bersetuju atas permintaan defendan pertama untuk menyertai satu skim insuran kumpulan ('pelan insuran tersebut'). Memandangkan tunggakan tuntutan-tuntutan lama tidak dijelaskan oleh pemohon tersebut kepada responden, responden telah menamatkan pelan insuran tersebut pada 30 Jun 1998 untuk menuntut tunggakan berjumlah RM120,288.40 dari pemohon tersebut. Walaupun berulangkali tuntutan telah dibuat terhadap pemohon. Isu tunggal yang perlu ditentukan oleh mahkamah yang terdahulu adalah samada pemohon secara am sebagai syarikat insuran *per se* adalah bertanggangungjawab terhadap responden dan tuntutan yang dikemukakan oleh responden. Hakim bijaksana telah memberi penghakiman bagi pihak responden dan telah mengarahkan pemohon untuk membayar jumlah seperti yang dituntut berserta kos.

Diputuskan:
Oleh Abu Mansor Ali HMR

[1] Sesebuah mahkamah rayuan tidak akan mencampuri keputusan yang dibuat oleh mahkamah rendah, melainkan dapat dibuktikan mahkamah tersebut telah membuat kesilapan undang-undang. Di dalam kes ini, tiada bukti *prima facie* yang menunjukkan hakim bijaksana telah membuat kesilapan.

[2] Pemohon berhak untuk memfailkan rayuan di Mahkamah Persekutuan. Walaubagaimanapun, sebelum berbuat demikian, pemohon mestilah mempertimbangkan kedudukan mereka berdasarkan keputusan Mahkamah Persekutuan di dalam kes *Auto Dunia Sdn Bhd lwn. Wong Sai Fatt & Yang Lain* [1995] 3 CLJ 485, di mana Mahkamah Persekutuan, berdasarkan alasan-alasan yang telah diberikan, enggan membenarkan permohonan rayuan yang telah ditolak oleh Mahkamah Rayuan.

[Permohonan ditolak.]

Case(s) referred to:
Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors [1995] 3 CLJ 485 ***(refd)***
Pang Hon Chin v. Nahar Singh [1986] 2 MLJ 145 ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 68(1)(a)

For the appellant - A Kanesalingam; M/s Kanesalingam & Co
For the respondent - Teoh Soo Bee; M/s K Ahmad & Yong

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22(23)-260-88]

Reported by Farah Naim

JUDGMENT

Abu Mansor Ali JCA:

The applicant, by Notice of Motion, applies for leave to appeal to the Court of Appeal, under s. 68(1)(a) of the Courts of Judicature Act 1964 (Act 91), against the whole decision of Justice Dato' Abdul Hamid bin Hj. Mohamed, given on 1 July 1996 in the High Court at Penang in Civil Suit No. 22(23)-260-88 and for the usual further order of extension of time to file and serve of the Notice of Appeal and costs.

Mr. Ng Hong Ching, the applicant's Manager, Accounts Department affirmed an affidavit in support of the application. He stated that on 1 July 1996, Justice Dato' Abdul Hamid bin Hj. Mohamed made an order that the applicant would be liable as an insurer *per se* in respect of a claim by the respondent against one other party and the applicant in the said High Court.

The applicant, not satisfied with the whole of the said decision and since the claim of the respondent is for a sum less than RM250,000 ie, RM120,288.40 leave is, therefore, required.

After hearing parties on 2 March 1999, we dismissed the applicant's motion with costs to the respondent. We now give our reasons for such dismissal.

In order that we may appreciate better the dispute leading up to this application before us, it is necessary that we give the facts of this present claim.

The plaintiff (plaintiff) is Pulau Pinang Clinic Sdn. Bhd. whose address at No. 1, Jalan Pangkor, Pulau Pinang. The 1st defendant, Kenchan Associates Sdn. Bhd., (1st defendant) does business at Wisma Central, Kuala Lumpur and the 2nd defendant, United Oriental Assurance Sdn. Bhd. (2nd defendant), is also in Kuala Lumpur, No.36, Jalan Ampang.

By an oral agreement made between the 1st defendant and the plaintiff and 2nd defendant on or before 1 September 1986, the plaintiff agreed, at the 1st defendant's request, to participate in a group insurance scheme known as the Medicity Health Insurance Plan (the insurance plan) pursuant to which the 1st defendant will arrange to cover certain individuals, to be registered with the 1st defendant, as members for group medical insurance cover under the said insurance plan with the 2nd defendant.

It was also orally agreed between the plaintiff, the 1st defendant and the 2nd defendant that payment of the plaintiff's fees, incurred by the 1st defendant's members' medical treatment are to be paid by the 2nd defendant upon claims being submitted by the plaintiff to the 2nd defendant whereupon the 1st defendant would assist with regard to the settlement/payment of such claims by liaising between the plaintiff and the 2nd defendant.

Though the above was the agreement of the parties, in actual practice, however, since the plaintiff's participation, the plaintiff's fees incurred by the 1st defendant's members had been paid direct to the plaintiff by the 1st defendant as agents for the 2nd defendant.

In the implementation of this insurance plan, it was pleaded in the plaintiff's claim the parties did come to some alternative arrangement which resulted in 1st defendant holding in favour of the plaintiff sums payable under the insurance plan.

The parties relation did not run smoothly as expected and by 10 February 1988 the 2nd defendant's representative agreed to look into a long outstanding claim of the plaintiff amounting to M$110,904.25.

By 22 April 1988, the plaintiff was informed by the 1st defendant that a sum of M$28,649.15 had been approved by the 2nd defendant but the plaintiff, as of that date, had only received M$890.10 towards that M$28,649.15. And at that 22 April 1988 meeting the 1st defendant requested till the end of May 1988 to sort out all claims but no payment was made eventually.

On 8 June 1988, the 1st defendant put forward certain proposals to settle the claim, as pleaded in para 11 of the plaintiff's statement of claim but it was rejected by the plaintiff.

In this claim as pleaded, the 1st and 2nd defendants failed to pay the plaintiff the sum of M$120,288.40, being the plaintiff's fees for attending to the patients/members of the 1st defendant, under the insurance plan and that sum was due and owing to the plaintiff as at 29 May 1988.

As no payment was made by the 1st and 2nd defendants inspite of repeated demands, the plaintiff, by notice, on 30 June 1988 terminated the insurance plan, with effect from 1 October 1988, at the same time demanding settlement of the outstanding sum as of that date. The plaintiff's solicitors then issued the required notice demanding that sum.

The plaintiff, therefore, prayed for a sum of M$120,288.40, the amount of claim up to 29 May 1988, the usual interest from 30 May 1988 to realisation and other incidental of legal and other costs.

The 1st defendant was not represented by anyone. The 2nd defendant in the statement of defence, while admitting that they did issue a policy of insurance to the 1st defendant, known as Medicity Health Insurance plan, denied that they had entered into any agreement with the plaintiff at all and consequently denied any privity of contract between them and the plaintiff. The other portions of the 2nd defendant's statement of defence all go towards denial of the alleged arrangement with the plaintiff. The 2nd defendant admitted to sending the officials to the meetings spoken of by the plaintiff, but defended themselves that the meetings were of 'without prejudice' basis and the 2nd defendant also admitted processing 122 claims from the 1st defendant but they said have credited the 1st defendant the sum owing. In the alternative the 2nd defendant aver the plaintiff had made excessive claims and not in accordance with policy issued by the 2nd defendant.

The plaintiff's claim came before Dato' Abdul Hamid bin Mohamed, J on 8 April 1996. Instead of proceeding with the whole claim, by consent, the parties agreed that day's hearing was only for the purpose of determining the question: whether the 2nd defendant insurer is generally liable as insurer *per se*, to the plaintiff in respect of the claims made herein before going into each claim one by one – as ordered on 29 February 1996. In a full hearing, where the plaintiff called three witnesses and the 2nd defendant called one witness, over a two day period and after having had the benefit of arguments of counsel for the plaintiff and the 2nd defendant and their written submissions, the learned judge adjourned the case for judgment on 1 July 1996 and he answered the question posed by the parties in the affirmative and the learned judge ordered the 2nd defendant do pay the plaintiff the amount to be determined in the application and he also ordered costs against the 2nd defendant.

As already stated, the applicant was seeking the leave of this court to appeal against the decision of the learned judge. Section 68 of the Judicature Act 1964 provides:

> (1) No appeal shall be brought to the Court of Appeal in any of the following cases:
>
> (a) When the amount or value of the subject-matter of the claim (exclusive of interest) is less than two hundred and fifty thousand ringgit except with the leave of the Court of Appeal.

In the same affidavit of Mr. Ng Hong Ching affirmed in support of this Motion for leave, in para. 7 thereof he is advised and verily believe that leave to bring an appeal should be given to the applicant on the following grounds:

(i) It is a decision affecting a fundamental principle of law;

(ii) It is a decision of vital importance in the public interest;

(iii) There is a serious and important issue of law involved;

(iv) There is a question of general principle upon which further argument and a decision of a higher tribunal will be a public advantage.

Before us Mr. Kanesalingam for the 2nd defendant, with due respect, failed to show us that the learned judge's decision was anything of those as alleged in para. 7 of the supporting affidavit. Counsel's submission was nothing more than saying that the learned judge had found that the insurance company, 2nd defendant, is liable.

He also referred us to the evidence of PW3 Chan Foo Yau. He submitted that at p. 60 para E of the Motion, the notes of the proceedings before the learned judge showed that the whole sum had been settled.

As a matter of fact, PW3's (PW4 an error) evidence commenced at p. 49 of the Record. The witness PW3 was the Managing Director of the 1st defendant. The witness, as expected, was able to describe to the learned judge what the group insurance plan was all about. PW3's evidence is found from p. 49 to p. 62 and the whole of the evidence had provided the foundation for the learned judge to enable him to answer the question posed by the parties in this action that the 2nd defendant was liable to pay the plaintiff for amounts to be determined by him at a later date.

It is trite law and very well settled that an appellate court will not lightly interfere with the finding of the court below unless it can be shown the lower court had erred. In an appeal to the Court of Appeal where leave is sought, the matter is still dealt with by the principles enunciated in *Pang Hon Chin v. Nahar Singh* [1986] 2 MLJ 145 where justice Edgar Joseph Jr (as he then was) held that leave can only be given "where the applicant is able to demonstrate a *prima facie* case of error". We find no such error.

For reasons given as stated above, we dismissed this application for leave to appeal with cost. The applicant is at liberty to proceed further, if they so wish but before the applicant set out to do so, they may well want to consider their position in view of the decision of the Federal Court in *Auto Dunia Sdn Bhd v. Wong Sai Fatt & 3 Ors* [1995] 3 CLJ 485 where that court, for reasons given, declined to give leave to appeal to it from the refusal of leave to appeal by the Court of Appeal.